

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 TOMMY LEE CROW,

11 CASE NO. 16-5277 RJB

12 Petitioner,

13 v.
14 RON HAYNES,

15 Respondent.

16 THIS MATTER comes before the Court on the Ninth Circuit Court of Appeals order
17 remanding this case to issue a modified certificate of appealability which designates which of
18 Petitioner's claims meet the standard in 28 U.S.C. § 2253(c)(3). Dkt. 75. The Court has
19 considered the order and the remaining file.

20 On August 20, 2020, a Report and Recommendation was filed in this case recommending
21 that no evidentiary hearing be held, the Petitioner's grounds for relief be denied, and the petition
22 be dismissed. Dkt. 68. It also recommended that a certificate of appealability issue but did not
23 specify which of Plaintiff's claims met the standard. *Id.*

1 The Report and Recommendation was adopted over the Plaintiff's objections. Dkts. 69-
2 70. The Plaintiff appealed that decision to the Ninth Circuit Court of Appeals.

3 On December 21, 2020, the Ninth Circuit Court of Appeals issued the instant order
4 directing this Court to designate which of the Petitioner's grounds for relief meet the standard
5 under 28 U.S.C. § 2253(c)(3) and to issue a modified certificate of appealability.

6 **Standard.** Under 28 U.S.C. § 2253(c)(3), a certificate of appealability shall indicate
7 which issues satisfy the showing required by 28 U.S.C. § 2253(c)(2). Section 2253(c)(2), in
8 turn, requires that a Petitioner make "a substantial showing of the denial of a constitutional right"
9 in order for a certificate of appealability to issue. To obtain a Certificate of Appealability under
10 28 U.S.C. § 2253(c), a *habeas* petitioner must make a showing that reasonable jurists could
11 disagree with the district court's resolution of his or her constitutional claims or that jurists could
12 agree the issues presented were adequate to deserve encouragement to proceed further. *Slack v.*
13 *McDaniel*, 529 U.S. 473, 483–485 (2000) (*citing Barefoot v. Estelle*, 463 U.S. 880, 893 n.4
14 (1983)).

15 **Discussion.** As pointed out in the Report and Recommendation, Petitioner's amended
16 petition presents nine claims for relief: (1) that the trial court unconstitutionally allowed evidence of
17 a prior assault, (2) that his trial counsel was ineffective for failing to move to exclude the prior
18 assault evidence, (3) that the trial court's limiting instruction regarding the prior assault evidence was
19 unconstitutional, (4) that his trial counsel was ineffective for failing to object to the limiting
20 instruction, (5) that an accomplice liability instruction relieved the State of its burden of proof, (6)
21 that the prosecutor went beyond arguing inferences from the trial evidence and improperly expressed
22 personal opinion in the closing argument, (7) that the prosecutor failed to disclose material
23 exculpatory evidence and coerced a State witness to give false testimony, (8) that appellate counsel
24

1 was ineffective for failing to raise several arguments, and (9) that the jury's verdict was not
2 unanimous. Dkt. 68 (*citing* Dkt. 10).

3 A certificate of appealability should issue on Petitioner's claims one through four only.
4 The Petitioner has sufficiently shown that reasonable jurists could disagree with this Court's
5 resolution of his claims one through four or that jurists could agree these issues were adequate to
6 deserve encouragement to proceed further. *Slack*, at 483–485. A certificate of appealability
7 should not issue on the Petitioner's remaining claims.

8 It is **ORDERED** that:

- 9
- 10 • A modified certificate of appealability on Petitioner's claims one through four
only **IS GRANTED**.

11 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
12 to any party appearing *pro se* at said party's last known address.

13 Dated this 21st day of December, 2020.

14 
15

16 ROBERT J. BRYAN
United States District Judge